Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1165

THE HONORABLE THEODORE L. SENDAK,
in his capacity as Attorney General
of the State of Indiana,

Appellant

VS.

CLYDE NIHISER, d/b/a Movieland Drive-
In Theater,

Appellee

Appeal from the United States District
Court for the Northern District of
Indiana, Fort Wayne Division

MOTION TO AFFIRM

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed, on the ground that the question raised is so unsubstantial as not to warrant further Argument.

I.

Statement of the Case and The Proceedings Below

This is a direct appeal from the final judgment and decree entered on November 14, 1974, by a District Court of three judges,[1] specially constituted pursuant to 28 U.S.C., §2281 and §2284, declaring the Indiana Nuisance Statute, I.C. 35-30-10.5, unconstitutional under the First and Fourteenth Amendments to the United States Constitution and enjoining its enforcement.

On October 18, 1973, Clyde Nihiser, d/b/a Movieland Drive-In Theater, brought this action in the United States District Court for the

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[1]Judge Beamer indicated an intention to approve the holding of the decision, but died on October 21, 1974, before the opinion was drafted.

Northern District of Indiana, Fort Wayne Division, seeking a temporary and permanent injunction to restrain state defendants from proceeding under Public Law 336 of the 1973 Acts of the Indiana General Assembly, I.C. 35-30-10.5, commonly referred to as the Indiana Nuisance Statute. The Indiana Nuisance Statute provides procedures for declaring a place which produces or displays obscene films a nuisance.

Injunctive relief was sought under the provisions of 42 U.S.C.A., §1983; 28 U.S.C.A., §1331; 28 U.S.C.A., §1343;28 U.S.C.A., §2284(3); and Rule 65, Fed.R.Civ.P.

Clyde Nihiser also sought to have the Indiana Nuisance Statute declared unconstitutional, alleging jurisdiction for relief upon 28 U.S.C.A., §2201, §2202, and Rule 57, Fed.R.Civ.P.

On June 4, 1974, the District Court entered a Memorandum of Decision and Order, denying the Motion to Dismiss and Motion to Strike filed by the State defendants.

On July 25, 1974, Clyde Nihiser filed a Motion for Summary Judgment, based upon the record of the case to that point. The State defendants filed no affidavits contesting the Motion for Summary Judgment. On November 14, 1974, the District Court entered its final judgment in the case, incorporating by reference the Memorandum of Decision and Order, dated June 4, 1974.

II.

Argument

The Case Presents No Substantial Question Not Previously Decided by This Court.

In the Jurisdictional Statement filed by Appellant, the sole question

presented to this Court is one of abstention, and is found at page 4 of that brief. Although the question is stated:

> "Whether the District Court erred in refusing to abstain in a case involving a state statute which has never been construed by state courts, but rather giving that statute a strained and unrealistic interpretation which would make the statute unconstitutional.",

it presents a simple question of abstention, which has already been answered many times by this tribunal. The words, ". . . but rather giving that statute a strained and unrealistic interpretation which would make the statute unconstitutional," constitute a naked allegation unsupported by the record in this case or any law cited by appellant, for the apparent purpose of flavoring the question with some additional characteristic which would distinquish it in some way from previous

decisions of this Court covering the basic question which appellant raises.

It is the position of the appellee that the District Court properly refused to abstain in the case at bar. This Court has held that abstention is inappropriate in a case where the state statute is justifiably attacked on its face as abridging free expression, or as applied for the purpose of discouraging protected activities. [Dombrowski v. Pfister, 380 U.S. 479 (1965).]

In Zwickler v. Koota, 389 U.S. 241 (1967), this Court held that where the state statute is attacked as void for overbreadth and is not fairly subject to a limiting interpretation that will avoid or modify the federal constitutional problem, abstention is improper.

The record in this cause reflects an attack on the Indiana Nuisance

Statute because it does, on its face, constitute an abridgment of free expression under the First and Fourteenth Amendments to the United States Constitution; and, further attacks the statute as being over-broad under the 1973 decision of this Court in Miller v. California, 413 U.S. 15.

Appellee would further urge that the District Court was proper in its determination that the overbreadth of the statute was not subject to a limiting interpretation that would avoid or modify the federal constitutional problem, since the Indiana Supreme Court had already refused to so construe similar language in corresponding criminal statutes as exists in the Indiana Nuisance Statute.[2]

[2]See Mohney v. State, ___Ind.___, 300 N.E.2d 66 (1973); and Stroud v. State, ___Ind.___, 300 N.E.2d 100 (1973).

Lake Carrier Association v. MacMullen, 406 U.S. 498 (1972), and Harrison v. N.A.A.C.P., 306 U.S. 167 (1959), cited in the Jurisdictional Statement, are not controlling, since the challenged statute is not capable of a construction by the state court which would avoid or modify the federal constitutional questions involved. This is so because the statutory scheme involved therein is flagrantly and patently violative of express constitutional prohibitions in practically every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to enforce it. [Watson v. Buck, 313 U.S. 387 (1941).]

Thus, appellee urges that the District Court was correct in finding the issues at bar to constitute "unusual

circumstances" which fit the case into an exception to the rule of Younger v. Harris, 401 U.S. 37, (1971) and, therefore, not a proper case for abstention.

III.

Conclusion

WHEREFORE, appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this cause by the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Respectfully submitted,

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